within the time stipulated. They alleged that they had submitted the plans on 14 April 1983. Before doing so, they had discussed the matter with the wife of the first applicant who is also the mother of the second applicant and who was at all times the servant or agent of both the applicants. She had also been given a layout plan to which she and the applicants had no objections.

Subsequently, the Pengarah Tanah dan Galian approved in principle the development of the lands on or about 9 March 1984 and the plans were submitted on or about 7 May 1984 following his guidelines. On or about 29 August 1984, the respondent was required to make amendments to the plans and it submitted the amended plans following the guidelines on 25 September 1984.

According to the deponent, the said plans were approved by the Pengarah Tanah dan Galian on 20 November 1984 but the applicants' agent was not satisfied with the layout plan, in particular as regards the siting of the surau. The respondent duly informed her that the applicants' demands would delay the development of the said land and asked for a 15-month extension to which she had agreed on a number of occasions. Consequently, the respondent drew up fresh plans resiting the surau and persuaded the Pengarah Tanah dan Galian to accept the amended plans which he did on 3 July 1985.

The respondent then requested the applicants to put the extension of time in writing but the applicants refused and insisted on the forfeiture of the sum of $20,000 advanced to them as agreed liquidated damages for the extension period as stated in the said agreement. In her affidavit dated 5 April 1988, the second applicant denied, except as regards the siting of the surau, all the allegations contained in the respondent's affidavit.

Learned counsel for the respondent submitted that since this was an application under O 81 of the Rules of the High Court 1980, the applicants had to verify the facts and state that the respondent had no defence to the action. The respondent had accordingly filed their defence and had counterclaimed for the considerable sums of money they had expended on the encouragement of the agent for the applicants. As such, counsel argued that unconditional leave to defend should be given to the respondent as there was a good defence on the merits and there were issues to be tried.

Having considered the arguments and the affidavits, I was of the opinion that the agreement was quite clear and unambiguous as regards the time period for obtaining the approval for conversion and subdivision. Apart from the fact that the 30-month period was already a reasonable period of time for that purpose, there was also no provision for extension of time in the agreement.

In view of the breach of cl (1)(b) of art 2 of the agreement, the contract between the parties was, to my mind, deemed to be terminated and the applicants were liable to pay the $10,000 as refund to the respondent. Further, by virtue of s 92 of the Evidence Act 1950, the court would have to exclude the evidence of any oral agreement, between the respondent and the purported agent of the applicants, as regards the extension of time granted by the latter.

On these facts and considerations, I was of the view that the respondent had no defence on the merits and consequently there were no triable issues. In the event, I granted the order in terms of the motion except that the first prayer was amended to read 'terminated' instead of 'null and void'.

Order accordingly.

Solicitors: *Lim Seong Chun & Co; Concisom & Co.*

Reported by *PS Ranjan*

Syarikat Soo Brothers Construction v Gazfin Sdn Bhd

HIGH COURT (IPOH) – CIVIL SUIT NOS 116 OF 1985 AND 24-89-86
ABDUL MALEK J
23 APRIL 1988

Contract – Building contract – Claim for amount due on certificate of architect – Delay in completion – Claim for damages – Whether time essence of contract

In this case the plaintiff claimed the sum of $145,456.19 being the money due on a certificate issued by the architect on a building contract. The defendant did not dispute the amount claimed but stated that as there was delay in completion, it was entitled to damages. It was not disputed in this case that the written agreement was signed three months after the purported date of completion and that the defendant had delayed in making payments resulting in the plaintiff threatening to stop work.

Held, allowing the application: On the facts and on the authorities cited, time was no longer of the essence of the contract and the defendant was not entitled to liquidated and ascertained damages as the court was not in a position to ascertain when the claim for damages should commence.

Cases referred to

1 *Yeow Kim Pong Realty Ltd* v *Ng Kim Pong* [1962] MLJ 118 (refd)
2 *Sim Chio Huat* v *Wong Ted Fui* [1983] 1 MLJ 151 (refd)

Miss Ong Geok Lan for the plaintiff.
Kamaluddin Maamor for the defendant.

Cur Adv Vult

Abdul Malek J: In Civil Suit No 116/85 the plaintiff is claiming from the defendant the sum of $145,456.19

being the money due on a certificate dated 30 October 1984 issued by the defendant's architect pursuant to a contract made in writing between the plaintiff and the defendant on 18 April 1983 by which agreement the defendant had agreed to pay the plaintiff within 14 days from the date of presentation of the certificate by the defendant's architect. In addition, the plaintiff had also asked for interest at 8% from 30 October 1984 to the date of realization and costs. In Civil Suit No 24-89-86, the plaintiff is suing the defendant for $27,159.70 being the money due on a similar certificate dated 15 October 1985, interest at the rate of 8% from 15 October 1985 and costs.

In Civil Suit No 116/85, the defendant does not dispute the agreement dated 18 April 1983 and the demand made for the sum claimed but contends that the plaintiff had completed the erection of the seven units of double-storey shophouses, 63 units of double-storey terrace houses and two units of double-storey semi-detached houses only on 30 August 1984 when by the agreement they should have done so on 18 January 1983. By reason of the delay, the defendant maintained that by virtue of cl 22 of the said agreement, they were entitled to the liquidated and ascertained damages which they particularized in their statement of defence, the total of which came to $296,414 for which they counterclaimed.

In their reply and defence to the counterclaim, the plaintiff agreed with the completion date but averred that they had regularly and diligently proceeded with the said works and any delay was caused solely by the defendant which had failed to make payments to the plaintiff for the said works which had been certified to be completed within 14 days from the presentation of the certificate of payment to the defendant. The plaintiff accordingly detailed the particulars of the delayed dates of payments. Further and in the alternative, the plaintiff pleaded that the architect acted partially and wrongly withheld certain certificates in respect of the sums claimed by the plaintiff. The plaintiff also stated that they were not liable for any damage, if any, sustained by the defendant.

Basically a similar statement of defence, set-off and counterclaim and reply and defence to counterclaim were filed in Civil Suit No 24-89-86.

Due to time constraints despite an earlier order for an early hearing, these two consolidated cases could not go on the first dates of hearing, that is, 21-22 January 1988 and they were duly adjourned to 11 February 1988 whereupon counsel for both parties informed the court that since all the three bundles of documents were agreed upon and marked accordingly as AB1, AB2 and AB3, they were not calling any witnesses and were agreeable to their matters being decided by way of their written submissions only which by consent were to be submitted by learned counsel for the plaintiff by 29 February 1988 (later on application extended to 7 March 1988) and by learned counsel for the defendant by 15 March 1988.

In their written submissions, both counsel agreed that the plaintiff's claim of $172,615.89 was admitted by the defendant. The only issue was whether the defendant was entitled to the counterclaim amounting to $296,414.

Learned counsel for the plaintiff submitted that the facts were not actually in dispute. As stated in the agreement between the parties dated 18 April 1983, the plaintiff had agreed to erect and complete seven units of double-storey shophouses, 63 units of double-storey terrace houses and two units of double-storey semi-detached houses for the defendant. She specifically referred to cll 21, 22, 25, 26 and 30, and the appendix to the agreement.

Clause 21 states that on the date of possession, which was 4 January 1982 according to the appendix, possession of the site was to be given to the plaintiff who shall begin and regularly and diligently proceed with the works and complete the same before the date of completion, which was 18 January 1983 according to the appendix, subject to extension of time as provided in cll 23 and 32(1)(c) of the agreement.

Clause 22 provides that if the plaintiff fails to complete the works by the date of completion or within any extended time under cl 23 or 32(1)(c) and the architect certifies in writing that in his opinion the same ought reasonably so to have been completed then the plaintiff shall pay or allow to the defendant a sum calculated at the rate stated in the appendix as liquidated and ascertained damages for the period during which the works shall so remain or have remained incomplete and the defendant may deduct such sum from any moneys due or to become due to the plaintiff upon this contract.

Clause 25 specifies the situations when the defendant can terminate the employment of the plaintiff, amongst them, if the plaintiff without reasonable cause wholly suspends the carrying out of the works before the completion thereof, if the plaintiff fails to proceed diligently with the works, if the plaintiff refuses or persistently neglects to comply with a written notice from the architect requiring him to remove defective work or improper materials or goods materially affecting the works, or if the plaintiff fails to comply with cl 17 relating to assignment and subletting.

Similarly, cl 26 details the instances when the plaintiff can terminate his employment. These include when the defendant does not pay to the plaintiff the amount due on any certificate within the period for honouring certificates named in the appendix, if the defendant interferes with or obstructs the issue of any certificate due under this contract, where the work is suspended due to force majeure, civil commotion, loss or damage occasioned by the contingencies referred in cll 20A and 20B

and delay in others engaged by the defendant in executing work not forming part of this contract and where the defendant becomes bankrupt.

Clause 30 states that during the period of the interim certificate named in the appendix, the architect shall issue a certificate stating the amount due to the plaintiff from the defendant, and the plaintiff shall on presenting any such certificate to the defendant be entitled to payment therefor within the period for honouring certificates named in the appendix.

Learned counsel for the plaintiff submitted that since the defendant had admitted the plaintiff's claim of $172,615.89, the only issue to be decided by the court is whether the defendant is entitled to damages for the delay in the completion of the works as raised in the defendant's counterclaim. She contended that they were not so entitled as there had been a waiver and estoppel on the part of the defendant.

She conceded that the 63 units of double-storey terrace houses were completed on 24 August 1983 and the seven units of double-storey shophouses and two units of double-storey semi-detached houses were completed on 30 April 1984 whereas the date of completion was stated to be 18 January 1983. However, she argued that the defendant had by its conduct allowed the date of completion to pass. Firstly, the agreement itself was only signed on 18 April 1983 some three months after the purported date of completion stated therein. She also listed out the details of all the defendant's delayed payments. They had therefore not honoured the certificates of payments within the stipulated time and were in breach of the agreement.

She had also listed out the several times they had threatened the defendant by letter as regards the stoppage of the work because of late payments. The defendant did not at any time object to the stoppage and had subsequently paid the amounts due. The defendant and the architect had also never given notice to change the date of completion thereby accepting the fact that the said date of completion had passed.

Learned counsel for the plaintiff also submitted that when the plaintiff had earlier filed a writ of summons against the defendant for recovery of the ninth and tenth payments, the defendant had allowed judgment in default to be entered against them and subsequently paid the judgment sum, interest and costs. They never raised the issue of delay in completion even though, as in this case, it has since passed. In view of all this, time has ceased to be the essence of the contract and in consequence of the defendant's waiver as to the date of completion, there is no date to ascertain from when any damages could be claimed which means that no damages could be claimed.

Learned counsel for the defendant does not dispute the plaintiff's claim of $172,615.19 made up of the $145,456.19 for the 13th progress payment as claimed in Civil Suit No 116/85 and $27,159.70 being the final payment as claimed under Civil Suit No 24-89-86. Learned counsel referred in particular to cll 21-23 and the appendix to the agreement. All had been referred to by learned counsel for the plaintiff except cl 23 which provides for extension of time.

Learned counsel for the defendant submitted that the dates of possession and completion as stated in the appendix and the actual dates of completion of the relevant units stated in the agreement were not in dispute in which event the defendant was entitled to the liquidated and ascertained damages prayed for in the counterclaim on the calculations set out in the appendix amounting to $296,414.

Learned counsel went on to say that although cl 23 of the agreement provided for extension of time, the plaintiff had never availed themselves of this clause and the architect had never given nor the defendant had ever granted any extension of time for the completion beyond the agreed date of completion. Reference was made to *Chitty on Contracts*, 23rd Ed, at para 20 at p 20 which states 'a date is not essential. The date of a deed is the date of its delivery' and para 27 of p 27 which reads 'a party who executes a deed is estopped in a court of law from saying that the facts stated in the deed are not truly stated'. On this ground, learned counsel agreed what was relevant in the agreement are the contents and not the date of signing.

From the appendix to the agreement, time appears to be of the essence. However, the agreement was signed exactly three months *after* the purported date of completion. It is not disputed that the actual dates of completion were 24 August 1983 for the 63 units of double-storey terrace houses, and for the seven units of double-storey shophouses and two units of double-storey semi-detached houses 30 April 1984 according to counsel for the plaintiff and 30 August 1984 according to counsel for the defendant in their submissions.

This would mean the liquidated and ascertained damages stated in the agreement had already accrued on the date the parties signed the agreement. There is also ample evidence to show that the defendant never honoured the certificates of payment within the stipulated time.

These delayed payments had resulted in the plaintiff threatening to stop work as evidenced by the many letters in the agreed bundles. The defendant had never objected to the threatened stoppage and had always paid the amounts due later. In fact, a similar suit had been brought by the plaintiff for the ninth and tenth payments

and judgment in default had been entered against the defendant who had paid up the judgment sum, interest and costs without objecting to the late completion and without raising the issue of the liquidated and ascertained damages.

In *Yeow Kim Pong Realty Ltd* v *Ng Kim Pong*[1] the Privy Council held 'that where a party accepts performance without such agreement that party may not in a subsequent action claim compensation for non-performance at the time agreed unless at the time of accepting performance he has given notice of his intention to do so.'

In *Sim Chio Huat* v *Wong Ted Fui*[2] the Federal Court compared s 56 of the Contracts Act 1950 to the position arrived at common law. They went on to state that 'in a contract in which time is of the essence, when a party fails to perform it by the stipulated time, the innocent party has the right either to rescind the contract or to treat it as still subsisting. If he treats it either expressly or by conduct as still continuing, the contract exists but time ceases to be of the essence and becomes at large. Consequently he cannot claim the liquidated damages under the contract unless there is a provision as to the extension of time. However, this cessation can be revived and so time can be restored to be of the essence by the innocent party serving a notice to the party in default giving a new date of completion.' In that case there was no provision for extension of time as in the present case but the defendant here never gave notice to the plaintiff as to the revival of the fact that time is of the essence, having acquiesced in the earlier delays caused by their delayed payments and having paid the judgment sum for the ninth and tenth payments after a default judgment without claiming for liquidated and ascertained damages.

On these facts and on the authorities cited, I would hold that time was no longer the essence of the contract and the defendant was not entitled to the liquidated and ascertained damages as the court is not in a position to ascertain when the claim for damages should commence. As the parties have agreed that the plaintiff is entitled to the amounts claimed, I would therefore give judgment for the plaintiff as prayed with costs in both civil suits and dismiss the defendant's counterclaim with costs.

Application allowed.

Solicitors: *Joseph Tan & Tang; Kamaluddin Maamor & Co.*

Reported by *Prof Ahmad Ibrahim*

Dato Haji Abdul Malik bin Haji Ahmad & Anor v Registrar of Societies, Malaysia

HIGH COURT (KUALA LUMPUR) – ORIGINATING SUMMONS NO R8-32-48-88
AJAIB SINGH J
14 MAY 1988

Civil Procedure – Order of certiorari against cancellation of registration of UMNO as a society – Leave to apply for – Application for leave made 28 days out of time – Delay to be accounted for to satisfaction of court – Whether applicants have done so – Applicants cannot claim to be ignorant of their rights – Rules of the High Court 1980, O 53 rr 1(2) & 1A

Societies – Cancellation of registration of UMNO as a society – Leave to apply for order of certiorari – Application for leave made 28 days out of time – Delay to be accounted for to satisfaction of court – Whether applicants have done so – Applicants cannot claim to be ignorant of their rights – Rules of the High Court 1980, O 53 rr 1(2) & 1A

The applicants sought leave to apply for an order of certiorari against the respondent under O 53 r 1(2) of the Rules of the High Court 1980 to quash the decision of the respondent dated 12 February 1988 whereby he had cancelled the registration of UMNO as a society. The applicants filed several affidavits giving their reasons for the delay.

Held, dismissing the application:

(1) Order 53 r 1A of the Rules of the High Court 1980 provided that leave should not be granted to apply for an order of certiorari unless the application for leave was made within six weeks after the date of the proceeding or the delay was accounted for to the satisfaction of the court or judge to whom the application was made.

(2) The present application for leave to apply for an order of certiorari was filed on 22 April 1988, some 28 days out of time. The court was not satisfied that the applicants had accounted for the delay in making their application.

(3) The reasons which the applicants put forward for the delay were considered rather flimsy and they could not claim to be ignorant of their rights if they were minded to have the registrar's decision quashed.

Legislation referred to
Rules of the High Court 1980 O 53 rr 1(2), (3), 1A

Dato Haji Abdullah bin Ngah for the applicants.

Cur Adv Vult

Ajaib Singh J: The applicants in this case sought leave to apply for an order of certiorari against the respondent under O 53 r 1(2) of the Rules of the High Court 1980 to quash the decision of the respondent dated 12 February 1988 whereby he had cancelled the registration of UMNO as a society. Notice of the application was duly given to the Attorney General's Chambers and copies of the requisite statement and affidavits were lodged in those chambers pursuant to O 53 r 1(3). The Attorney General, however, did not thereby become a party in the proceedings for the hearing of the application for leave.